Muhamad Syafiq bin Rozaidi v Mohd Rashiddin bin Johari

HIGH COURT (IPOH) — CIVIL APPEAL NO 12BNCVC-32–05 OF 2015
SM KOMATHY JC
2 FEBRUARY 2016

Evidence — Presumption — Adverse inference — Claim for loss of earnings as a result of motor vehicle accident — Supporting documents said to exist not tendered to prove claim — Failure to call crucial witnesses — Whether omission justified invocation of adverse inference

Tort — Damages — Road accident — Award of loss of earnings — Appeal against quantum — Award of partial loss of earnings based on multiplicand of RM1,000 — Whether multiplicand excessive — Whether plaintiff's reduction in earnings proven — Whether evidence of plaintiff's wife hearsay and inadmissible — Supporting documents said to exist not tendered to prove claim — Failure to call crucial witnesses — Loss of earnings to be pleaded and specifically proved — Evidence Act 1950 s 114(g) — Insufficient evidence to prove multiplicand of RM1,000 — Multiplicand reduced from RM1,000 to RM400 a month

The plaintiff brought a claim against the defendant to recover damages for the losses suffered as a result of a motor vehicle accident. The sessions court judge awarded the plaintiff, inter alia, a sum of RM132,000 as partial loss of earnings. This was based on a multiplicand of RM1,000 and a multiplier of 11 years. The defendant brought the present appeal on the grounds that the sessions court judge erred in assessing the multiplicand at RM1,000 a month. The defendant contended that the multiplicand of RM1,000 as partial loss of earnings was excessive as there was not an iota of evidence to show that the plaintiff's business was deriving a net income of RM3,000 a month prior to the accident and the sum was reduced to RM1,200 after the accident. The plaintiff's wife was the only witness called to prove the pre accident and post accident earnings of the plaintiff. According to the plaintiff's wife, the plaintiff employed two workers to assist him. She said that after the accident, her husband's friend, one Mohd Ayuhani managed the business on his behalf. Under cross-examination, the plaintiff's wife admitted that she was not involved in her husband's business. Her knowledge of the plaintiff's earnings was based on information given to her by the plaintiff. She went on to add that she had all the documents to support her testimony as regards the plaintiff's pre and post accident earnings, but none were submitted to the court.

Held, allowing the appeal with no order as to costs:

(1) A claim for loss of earnings is a claim for special damages and must be pleaded and specifically proved. A party seeking recovery of damages such as loss of earnings must provide adequate proof and the court cannot create a figure for those damages (see paras 11 & 12).

(2) The plaintiff's wife had no personal knowledge of the plaintiff's earnings. Despite, her assertion that she had all the documents to substantiate her evidence, none was produced. The omission called for the invocation of an adverse presumption under s 114(g) of the Evidence Act 1950, that if the documents evidencing the plaintiff's earnings were produced, it would not have supported the plaintiff's case. Nor was the plaintiff's friend, who incidentally was present in court, and the plaintiff's two employees called to show that there was a reduction in the income after the accident. No explanation was proffered for this omission although they were crucial witnesses (see para 13).

(3) An appellate judge generally does not disturb an award of damages by the trial judge on the ground that if he had tried this case in the first instance he would have been inclined to award a lesser figure (see para 15).

(4) The evidence of the plaintiff's earnings was meagre in the extreme and did not meet the evidentiary burden for recovery of special damages. To confirm the figure of RM1,000 awarded by the sessions judge would contravene the basic principle governing special damages. In light of the concession made by the defendant, the multiplicand was reduced from RM1,000 to RM400 a month (see paras 16 & 17).

[Bahasa Malaysia summary

Plaintif mengemukakan tuntutan terhadap defendan untuk mendapatkan ganti rugi bagi kerugian yang dialaminya akibat kemalangan kenderaan motor. Hakim mahkamah sesyen mengawardkan plaintif, antara lain, RM132,000 sebagai sebahagian daripada kehilangan pendapatan. Ini berdasarkan multiplicand RM1,000 dan pendarab 11 tahun. Defendan mengemukakan rayuan ini atas alasan bahawa hakim mahkamah sesyen terkhilaf dalam mentaksir multiplicand RM1,000 sebulan. Defendan menghujahkan bahawa multiplicand RM1,000 sebagai sebahagian kehilangan pendapatan adalah berlebihan kerana tiada sekelumit keterangan pun untuk menunjukkan bahawa perniagaan plaintif menjana RM3,000 sebulan sebelum kemalangan dan bahawa jumlah tersebut dikurangkan kepada RM1,200 selepas kemalangan. Isteri plaintif adalah satu-satunya saksi yang dipanggil untuk membuktikan pendapatan plaintif pra-kemalangan dan selepasnya. Menurut isteri plaintif, plaintif mengambil dua orang pekerja untuk membantunya. Menurut isterinya, selepas kemalangan tersebut, kawan suaminya, seorang yang bernama Mohd Ayuhani menguruskan perniagaan tersebut bagi pihaknya. Berdasarkan pemeriksaan balas, isteri plaintif mengaku bahawa dia tidak terlibat dengan perniagaan suaminya. Pengetahuan plaintif tentang

pendapatan plaintif adalah berdasarkan maklumat yang diberi oleh plaintif kepadanya. Dia menegaskan lagi bahawa dia mempunyai dokumen-dokumen untuk menyokong keterangan berkenaan pendapatan plaintif sebelum dan selepas kemalangan tetapi tiada satu pun yang dikemukakan di mahkamah.

Diputuskan, membenarkan rayuan tanpa perintah terhadap kos:

(1) Satu tuntutan bagi kehilangan pendapatan adalah tuntutan bagi ganti rugi khas dan mesti diplidkan dan dibuktikan secara khusus. Pihak yang ingin mendapatkan semula ganti rugi bagi kehilangan pendapatan mesti mengemukakan bukti yang secukupnya dan mahkamah tidak boleh mengira bagi kerugian tersebut (lihat perenggan 11 & 12).

(2) Isteri plaintif tiada pengetahuan peribadi tentang pendapatan plaintif. Walaupun dia menegaskan bahawa dia mempunyai semua dokumen untuk membuktikan keterangannya, tiada satu pun yang dikemukakan. Ketinggalan ini membangkitkan anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 bahawa jika dokumen-dokumen yang membuktikan pendapatan plaintif dikemukakan, ia tidak akan menyokong kes plaintif. Kawan plaintif juga, yang kebetulan berada di mahkamah, dan juga dua orang pekerjanya yang dipanggil, tidak menunjukkan pengurangan pendapatan selepas kemalangan. Tiada penjelasan diberi tentang ketinggalan ini walaupun mereka saksi-saksi penting (lihat perenggan 13).

(3) Seorang hakim rayuan tidak akan mengganggu award ganti rugi oleh hakim bicara atas alasan bahawa jika beliau membicarakan kesnya pada awal lagi beliau akan mengawardkan jumlah yang kurang (lihat perenggan 15).

(4) Keterangan pendapatan plaintif adalah tidak seberapa dan tidak memenuhi beban pembuktian bagi mendapatkan semula ganti rugi khas. Untuk mengesahkan jumlah RM1,000 yang diawardkan oleh hakim mahkamah sesyen akan bercanggah dengan prinsip asas yang mengawal selia ganti rugi khas. Melihat pada konsesi yang dibuat oleh defendan, multiplicand dikurangkan daripada RM1,000 kepada RM400 sebulan (lihat perenggan 16 & 17).]

Notes

For a case on adverse inference, see 7(2) *Mallal's Digest* (5th Ed, 2015) para 2718.

For cases on road accident, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 336–356.

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177, KBD (refd)
Chan Peng Fook v Kan Pak Lee [1974] 2 MLJ 197 (refd)

Sum Kum v Devaki Nair & Anor [1964] 1 MLJ 74, FC (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
Yee Yup Transport & Co & Anor v Wong Kong [1967] 2 MLJ 93, FC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Baljeet Kaur a/p Harbhajan Singh (VT Singam, D Gunasegaran & Co) for the appellant.
G Darshan Singh (Darshan, Syed, Amarjit & Partners) for the respondents.

SM Komathy JC:

[1] This appeal relates only to the damages awarded as partial loss of future earnings in a running-down case. The sole issue here is whether the sessions court judge was right in assessing the multiplicand at RM1,000 a month.

[2] A little background assists in understanding the matrix out of which this case arises. On 31 August 2013, an accident involving the plaintiff's motorcycle and the defendant's motorcycle resulted in the plaintiff sustaining severe injuries and becoming bed ridden. He brought an action against the defendant to recover damages for the losses suffered as a result of the accident. The plaintiff and the defendant agreed on the issue of liability at 30% and 70% respectively, and the trial proceeded only on the issue of quantam.

[3] After hearing the evidence and submissions, the sessions court judge awarded the plaintiff a sum of RM340,000 as general damages, RM276,000 towards nursing care and a sum of RM132,000 as partial loss of earnings. The sum of RM132,000 was based on a multiplicand of RM1,000 and a multiplier of 11 years. The multiplier was agreed at 11 years as the plaintiff was 33 years old at the time of the accident.

[4] The defendant's counsel Miss Baljeet Kaur contended that the multiplicand of RM1,000 as partial loss of earnings was excessive as there was not an iota of evidence to show that the plaintiff's business was deriving a net income of RM3,000 a month prior to the accident and the sum was reduced to RM1,200 after the accident. The plaintiff's counsel, Tan Sri Darshan Singh answered by contending that there was ample evidence to support the figure of RM1,000 and urged the court not to disturb the sessions court judge's assessment.

[5] In the light of the competing submissions, it behoves me to examine the evidence that was adduced by the plaintiff in support of his claim for loss of earnings.

[6] The plaintiff's wife was the only witness called to prove the pre accident and post accident earnings of the plaintiff. It was common ground that the plaintiff was the sole proprietor of a workshop under the name and style of Che Din Motor and the business was registered about six months prior to the accident. The plaintiff operated his workshop at a rented premises. According to the plaintiff's wife, the plaintiff employed two workers to assist him and they were each paid a salary of RM900 a month. The rental for the premises where the workshop was located was RM1,300 per mensem.

[7] Continuing with her testimony, she said that after the accident, her husband's friend, one Mohd Ayuhani managed the business on his behalf. Mohd Ayuhani took a bank loan for the purposes of running the plaintiff's business. He did so out of the kindness of his heart and did not take any part of the income derived from the business.

[8] Under cross-examination, the plaintiff's wife admitted that she was not involved in her husband's business. Her knowledge of the plaintiff's earnings was based on information given to her by the plaintiff. He had informed her that his net income was RM3,000 a month. She went on to add that she had all the documents to support her testimony as regards the plaintiff's pre and post accident earnings. Her husband maintained records of all his expenditure and income.

[9] In assessing the multiplicand at RM1,000, the sessions court judge reasoned:

> the wife has now taken the position of the husband as the bread winner of the family and had the plaintiff continued working he would have continued bringing in a monthly income to sustain the needs of his family. The plaintiff's wife was a housewife prior to the accident and currently has stepped into the business to manage it with the hope that it would continue to generate income for the family. With this in mind, I am of the view that although there was no documentary proof of how much his income was but with proof that he has a business registered under his name and is still running. I allowed this claim.

[10] I interpolate at this juncture to point out that the sessions court judge misapprehended the facts when she stated that after the accident the wife had taken the position of the husband as the bread winner of the family. By her own admission, the plaintiff's wife had clearly stated that she did not participate in the business and that she had no personal knowledge of the earnings of the plaintiff.

[11] A claim for loss of earnings is a claim for special damages and must be pleaded and specifically proved. The principle governing special damages is encapsulated in the much quoted words of Lord Goddard in the case of

Bonham-Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it.

[12] This principle was cited with approval and applied by the Federal Court in *Sum Kum v Devaki Nair & Anor* [1964] 1 MLJ 74. A party seeking recovery of damages such as loss of earnings must provide adequate proof and the court cannot create a figure for those damages.

[13] As noted earlier, the plaintiff's wife had no personal knowledge of the plaintiff's earnings. Despite, her assertion that she had all the documents to substantiate her evidence, none was produced. The defendant submitted, and I agree, that the omission calls for the invocation of an adverse presumption under s 114(g) of the Evidence Act 1950, that if the documents evidencing the plaintiff's earnings were produced, it would not have supported the plaintiff's case. Nor was the plaintiff's friend, who incidentally was present in court, and the plaintiff's two employees called to show that there was a reduction in the income after the accident. Again, no explanation was proffered for this omission although they were crucial witnesses.

[14] Tan Sri Darshan submitted and I agree that the application of this principle is relaxed in personal injury cases, and there have been instances where the courts have awarded loss of earnings despite the absence of documentary proof. See *Yee Yup Transport & Co & Anor v Wong Kong* [1967] 2 MLJ 93 and *Chan Peng Fook v Kan Pak Lee* [1974] 2 MLJ 197. It is important to note that no documents were available in that cases as the plaintiffs, who were prior to the accident in some form of employment or self employed, ceased to work or closed down their businesses after the accident. But, this not the case here. The plaintiff's business is still existing and he has in his possession all the documents.

[15] I am mindful that an appellate judge generally does not disturb an award of damages by the trial judge on the ground that if he had tried this case in the first instance he would have been inclined to award a lesser figure. The principles on which an appellate court can disturb an award of damages by the trial court were enunciated by the Federal Court in *Topaiwah v Salleh* [1968] 1 MLJ 284, as follows:

> In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled.

[16] The evidence of the plaintiff's earnings was meagre in the extreme and does not meet the evidentiary burden for recovery of special damages. To confirm the figure of RM1,000 awarded by the sessions court judge would contravene the basic principle governing special damages. Miss Baljit Kaur, in the circumstances, suggested a multiplicand of RM400.

[17] In light of the concession made by the defendant, and bearing in mind that the evidence in respect of the plaintiff's business was so unsatisfactory, I would reduce the multiplicand from RM1,000 to RM400 a month. This translates to a sum of RM52,800 as partial loss of future earnings for the plaintiff. I make no order as to costs and order that the deposit be refunded to the defendant.

Appeal allowed with no order as to costs.

Reported by Kanesh Sundrum